Supreme Court, U.S.
FILED

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IN THE SUPREME COURT
OF THE UNITED STATES

No._____
October Term, 1996

LESLIE SCHAFFER and GAIL SCHAFFER,
Petitioners,

vs.

AGRIBANK, FCB; FARM CREDIT SERVICES OF SOUTHERN MINNESOTA, ACA; THOMAS E. RESCH; JAMES E. BLOCH; FARM CREDIT MEDIATION PROGRAM; MINNESOTA EXTENSION SERVICE and the UNIVERSITY OF MINNESOTA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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52 pp

QUESTIONS PRESENTED FOR REVIEW

I: Whether the failure of Farm Credit Services and AgriBank, FCB, to follow restructuring procedures applicable to loans under the federal Agricultural Credit Act, 12 U.S.C., Section 2202a (b)(3), should equitably void the sale and foreclosure of the Schaffers' farmstead?

II: Whether, despite the protection of statutory immunity, a mediator and his sponsoring agencies can be held legally liable for nonfeasance, particularly for failure to memorialize a work-out agreement with a lender?

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PETITION FOR WRIT OF CERTIORARI

Leslie Schaffer and his wife, Gail Schaffer, ask that a writ of certiorari issue to review the order of the Supreme Court of the State of Minnesota, filed March 26, 1997, declining review of a decision of the Minnesota Court of Appeals, as well as the underlying decision of the Minnesota Court of Appeals filed on February 4, 1997.

OPINIONS BELOW

This Petition seeks review of the order of the Minnesota Supreme Court, *Leslie Schaffer, et al., Appellants, vs. AgriBank, FCB, f/k/a The Federal Land Bank of St. Paul, et al, Respondents, [and] Farm Credit Mediation Program, et al., Respondents*, C7-96-1273 (Minn. March 26, 1997), reprinted at page 1a of the Appendix, Appendix A. This order affirmed the judgment of the Minnesota Court of Appeals, *Leslie Schaffer, et al., Appellants, vs. AgriBank, FCB, f/k/a The Federal Land Bank of St. Paul, et al, Respondents, [and] Farm Credit Mediation Program, et al., Respondents*, Appellate Case No. C7-96-1273 (Minn. Ct. App. February 4, 1997), reproduced at page 3a of the Appendix, Appendix B. Neither of the Minnesota appellate decisions has been officially published.

The trial court had entered two separate orders for summary judgment in the case, District Court File No. C1-95-262, the first in favor of the mediators, Appendix C, at 11a, and the second in favor of AgriBank, FCB, and its employee, Thomas Resch, Appendix D, at 19a. Each order bears a February 27, 1996, date.

STATEMENT OF JURISDICTION

This Petition seeks review of the judgment of the Minnesota Supreme Court entered March 26, 1997, in this case and the underlying decision of the Minnesota Court of Appeals. Therefore, this United States Supreme Court has jurisdiction to grant this Petition pursuant to 28 U.S.C., Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI [2] holds that "this Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment V to the Constitution indicates that "[n]o person shall...be deprived of life, liberty, or property without due process of law...."

STATEMENT OF THE CASE

Schaffers raised the constitutional-federal law issue of not having received their rights under the Agricultural Credit Act at the trial court level and again at the appellate level and the due process issue of the mediator's nonfeasance. See the judicial Memorandum related to James Bloch and the University of Minnesota, 13a through 18a, and the accompanying Memorandum related to AgriBank and the Agricultural Credit Act, 21a through 27a, where Judge Bruce Gross discusses the same issues raised before this United States Supreme Court.

The Schaffer family farmed near Windom, Minnesota.

AgriBank, FCB, formerly the Federal Land Bank of St. Paul, owned the mortgage on Schaffers' real property while Farm Credit Services of Southern Minnesota managed the loan.

Schaffers defaulted on their mortgage. The parties to the mortgage requested mediation on Schaffers' debt. James Bloch acted as mediator under the Farm Credit Mediation Service, a service of the University of Minnesota.

The mediator Bloch and the Farm Credit Mediation Service owed certain obligations to the parties under Minnesota Statutes, Section 583.26, Subd. 10(b)(2); These obligations included filing a Termination of Mediation Statement which "describes or references agreements reached between a creditor and the debtor, if any, and agreements reached among creditors, if any."

Mediator James Bloch signed the Termination Statement: No Agreement Reached, on June 1, 1994, which does not reference a mutual agreement. However, other participating creditors by means of sworn statements relate that a work-out agreement had been reached, 32a et seq. The mediator did not provide any statement concerning this work-out agreement to the Schaffers, the creditors, or his own file.

Also, under the Agricultural Credit Act a farm family may offer a restructuring proposal to the quasi-federal lenders, here AgriBank and Farm Credit Services. The law holds, 12 U.S.C. Section 2202a (b)(3), that "No qualified lender may foreclose or continue any foreclosure proceedings with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section."

Although Schaffers personally delivered their restructuring proposal to Resch, he "refused to accept the restructuring proposal [documents]," Verified Complaint, Paragraph 12, at 3. Resch's flat refusal to accept Schaffers' restructuring proposal stands as prima facie evidence that Schaffers did not receive an opportunity to restructure their debts under the Agricultural Credit Act.

The impetus for AgriBank, FCB, to preclude the Schaffers from keeping their farm had to have been the remaining $300,000 equity in the Schaffers' farmstead, 29a.

ARGUMENT

Without having gotten any opportunity for restructuring, the foreclosure on the Schaffers' farm must be equitably voided.

I: The failure of Farm Credit Services and AgriBank, FCB, to follow restructuring procedures applicable to loans under the federal Agricultural Credit Act, 12 U.S.C., Section 2202a (b)(3), should equitably void the sale and foreclosure of the Schaffers' farmstead.

Schaffers, by means of a joint affidavit, testified:

> We had completed the forms for restructuring which had been mailed to us by Farm Credit Services. The responsive papers were complete. Thomas Resch[' the responsible employee for AgriBank and Farm Credit Services] refused to accept these forms for restructuring or to even consider them. Les

> Schaffer handed these papers to Mr. Resch and Resch refused to take the papers. Mr. Resch said he did not have time to talk to us, and he walked away from us and left the building. Mr. Resch did not deal with us in good faith in any way. We left the [Farm Credit Services] office because we did not know what else to do.

(Bracketed material has been added for the sake of clarity.)

State law, rather than federal law, is the primary law controlling foreclosure proceedings, *Federal Land Bank v. Warner*, 292 U.S. 53, 55 (1934).See also, *Federal Land Bank of St. Paul v. Lillehaugen*, 404 N.W.2d 452 (N.D. 1987).

Defenses to foreclosures involving federally-chartered agricultural lenders are also determined by state law, *Farm Credit Bank of Spokane v. Parsons et al.*, 758 F. Supp. 1368, 1370-71 (D. Montana 1990).

The court in *In re Kramer*, 107 B.R. 668, 670 (D. Nebraska 1989), avoided a foreclosure where the protections of the Agricultural Credit Act were not given to the borrowers.

See also, *Federal Land Bank of St. Paul v. Overboe*, 404 N.W.2d 445, 449 (N.D. 1987), which holds that "the failure of [Federal Land Bank] to comply with the administrative forbearance regulation and policies adopted pursuant to the regulations gives rise to a valid equitable defense to a foreclosure action under state law," citing *Federal National Mortgage Association v. Moore*, 609

F. Supp. 194 (N.D.Ill. 1985).

Lillard v. Farm Credit Services of Mid-America, 831 S.W.2d 626 (Ken. Ct. App. 1991), determined as a factual matter that Farm Credit had arbitrarily terminated the Lillards' restructuring process, just as Thomas Resch did with the Schaffers.

The Minnesota appellate courts have also voided a foreclosure where the federal lender deprived borrowers of restructuring rights granted by the Agricultural Credit Act, *Burgmeier et al. v. Farm Credit Bank of St. Paul*, 499 N.W.2d 43 (Minn. Ct. App. 1993), review by the Minnesota Supreme Court denied July 15, 1993), specifically citing 12 U.S.C. Section 2202a (b)(3).

Similarly, *Farm Credit Bank of Spokane v. District Court of the Third Judicial District of the State of Montana et al.*, 881 P.2d 594, 606 (Mont. 1994) (rehearing denied Oct. 20, 1994), observes that failure to comply with the Agricultural Credit Act could be raised to thwart a mortgage foreclosure: "[N]one of the authorities cited by the [Farm Credit Bank] support the argument that in an equitable foreclosure action failure to comply with the Act's restructure requirements cannot be raised as an equitable defense."

Harper v. Federal Land Bank of Spokane, 878 F.2d 1172, 1179 (9th Cir. 1989), a case reiterating the principle that there is no private cause of action under the Agricultural Credit Act, recognizes the "apparent right in some states of a borrower to allege the failure to afford restructuring rights as an affirmative defense to foreclosure." Minnesota is one of these states.

AgriBank did not allow Schaffers the right to restructure their debt.

The Minnesota Court of Appeals suggested in its *Schaffer* decision, by distinguishing its own *Burgmeier* decision, *op. cit.*, 9a, that the Schaffers should have brought suit against AgriBank before the redemption period had run, although no precedent or statute even intimates that this would be required.

Schaffers also had substantive due process expectations that federally-chartered, quasi-federal corporations would respect Schaffers' contractual rights granted in the Lender's Agreement which incorporates the Agricultural Credit Act by reference.

II: Notwithstanding the protection of statutory immunity, a mediator and his sponsoring agencies can be held legally liable for nonfeasance, particularly for failure to memorialize a work-out agreement with a lender.

The mediator in the Schaffer case failed to record an agreement reached between the parties and failed to issue an affidavit of bad faith.

The United States Supreme Court, in reviewing an Iowa case, *Amy v. The Supervisors of Des Moines County*, 78 U.S. 136, 138 (1870), stated that:

> The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses

> to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender.

Mediator Bloch failed in the most simple of his obligations, namely, to note the participants and their positions relative to the unpaid farm debt: Bloch did not memorialize the fact that the parties had reached a work-out agreement. This agreement could have served as a basis for a claim by Schaffers against AgriBank, under the Minnesota Farm Mediation legislation, Minnesota Statutes, Section 583.27.

Mediator Bloch also had a direct conflict of interest in that his own farm remained subject to an AgriBank mortgage during the time that Bloch served as mediator for the Schaffers and AgriBank.

The mediators here had contracted to assume certain responsibilities: The mediators had a legal duty to actually direct the mediation process and to formally report any agreement of the parties. When this duty is breached and damages accrue to the injured party, there is liability.

The trial court and the Minnesota Court of Appeals used the statutory immunity conferred on farm-credit mediators to protect the mediator from liability, "A mediator is immune from civil liability for actions within the scope of the position as mediator," Minnesota Statutes, Section 583.26, Subd.7.

The Respondents-Mediators had accepted a legal obligation to provide the essentials of the mediation process to the parties. As a simple due-process consideration, the mediators cannot absolve themselves from liability under an absolute immunity. *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 376 (Minn. 1989), citing *Melady v. South St. Paul Live Stock Exchange*, 142 Minn. 194, 197, 171 N.W. 806, 807 (Minn. 1919). See also, *E.C. Ernst, Inc., v. Manhattan Construction Co.*, 551 F.2d 1026, 1033 (5th Cir. 1977).

There is no immunity from liability for the performance of mere ministerial tasks, *Pletan v. Gaines*, 494 N.W.2d 38 (Minn. 1992). A duty is ministerial when the duty is "absolute, certain and imperative, involving the execution of a specific duty arising from fixed and designated facts," *Elwood v. County of Rice*, 423 N.W.2d 671, 677 (Minn. 1988).

Also, "imposing liability for ministerial acts... encourages public officials to exercise care while performing duties that require little or no independent judgment," *S.L.D. v. Kranz*, 498 N.W.2d 47, 50 (Minn. Ct. App. 1993).

There ought to be no immunity in the present case to protect Mediator Bloch or the University.

Bloch further failed to recall the parties to the negotiating table after May 9, despite the fact that he knew that the Farm Credit Mediation office had calculated the last date of the mediation period to be May 24.

These tasks were simply ministerial and did not involve policy-making or upper-level decision-making.

A failure to act creates liability: *Baar v. Tigerman et al.*, 189 Cal. Rptr. 834 (1983), and the decision affirming this case, *Baar v. Tigerman et al.*, 211 Cal. Rptr. 426 (1983), teaches that there is no immunity for an arbitrator where a plaintiff alleged breach of contract to conduct an arbitration and where the arbitrators negligently failed to act. Schaffers have testified by affidavit that they have not had the chance to gain the benefit of their mediated agreement.

The trial court decided this case on motions for summary judgment. Schaffers testified by affidavit that other creditors as well as Schaffers themselves understood that a work-out had been reached. These sworn statements should have precluded summary judgment.

CONCLUSION

This case presents an important legal issue concerning federally-chartered agricultural banks and their borrowers: Such banks cannot disregard federal statutes affording an opportunity for restructuring a farm family's indebtedness.

This Court ought also consider the related due process issue concerning the obligations and duties of a farm mediator under common law and under Minnesota Statutes where a mediator fails to record the fact that parties have reached an agreement.

The Schaffers ask that a Writ of Certiorari issue to review the decision of the Minnesota Court of Appeals and the order declining review by the Minnesota Supreme Court.

Dated at St. Paul, Minnesota, this 20th day of June, 1997.

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APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT
C7-96-1273

Leslie Schaffer, et al.,

Appellants,

vs.

Agribank, FCB, f/k/a The Federal Land Bank
of St. Paul; et al.,

Respondents,

Farm Credit Mediation Program, et al.,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Leslie Schaffer for further review be, and the same is, denied.

Dated: [March 26, 1997] BY THE COURT:

s/s
Chief Justice

APPENDIX B

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Leslie SCHAFFER, et al., Appellants,

v.

AGRIBANK, FCB, f/k/a The Federal Land Bank of St. Paul, et al., Respondents,

Farm Credit Mediation Program, et al., Respondents.

No. C7-96-1273.
Court of Appeals of Minnesota.
Feb. 4, 1997.

Lawrence H. Crosby, Crosby & Associates, 25 Empire Drive, St. Paul, MN 55103-1800 (for Appellants)

Jeff C. Braegelmann, Gislason, Dosland, Hunter & Malecki, P.L.L.P., One South State Street, P.O. Box 458, New Ulm, MN 56073 (for Respondents Agribank, Farm Credit Services, and Resch)

Mark B. Rotenberg, General Counsel, Tracy M. Smith, Associate General Counsel, University of Minnesota,, 325 Morrill Hall, 100 Church Street S.E., Minneapolis, MN 55455 (for Respondents Bloch and University of Minnesota)

Considered and decided by KALITOWSKI, Presiding Judge, CRIPPEN, Judge, and HARTEN, Judge.

UNPUBLISHED OPINION

CRIPPEN, Judge.

1. Appellants dispute the trial court's dismissal for failure to state a claim on the issue of mediator immunity. Appellants also claim causes of action against other defendants for failure to mediate in good faith and for breach of contract. We affirm.

FACTS

Appellants Leslie and Gail Schaffer are the former owners of farmland near Windom. AgriBank, FCB held a mortgage on appellants' property since 1983. Farm Credit Services of Southern Minnesota, ACA serviced the loan. On January 1, 1994, appellants failed to make a balloon payment due on the mortgage. On February 8, Agribank and Farm Credit sent appellants a notice of default and pending debt recapture, a notice of restructuring rights available under the Agricultural Credit Act, and a notice of mediation rights available under the Minnesota Farmer-Lender Mediation Act. Appellants requested mediation under the Farmer-Lender Mediation Act, and the parties held several mediation sessions, the first on March 8, 1994. James Bloch of the University of Minnesota Extension Service's Farm Credit Mediation Program was the mediator. Thomas Resch was present as a financial services executive with Farm Credit.

At an April 20, 1994 mediation session, Resch orally indicated to the appellants that Farm Credit would accept the balance of the mortgage without certain "recaptured" obligations. Resch indicated that Farm Credit would accept either cash or a letter of commitment from another lender who

would finance the balance. If appellants wished to pursue the settlement, either the cash or the letter of commitment was due by May 9, 1994. At the May 9 mediation session, appellants presented Resch with a letter from the president of 21st Century Bank of Balaton, Minnesota. In the letter, the bank president indicated that the bank was "interested in completing an application to submit to Rural Finance Authority" and that "it is safe to assume that the State of Minnesota would approve a loan." Resch did not consider the letter to be a definite letter of commitment and refused to accept it. Resch also claimed that the period in which to accept his offer had expired and that he would not accept any other letters. Appellants claimed that the mediation period should have continued until May 24, 1994, and that the letter constituted a valid commitment letter. The mediator, James Bloch, determined that no agreement could be reached, and he signed a termination document that stated this decision.

After the parties failed to reach an agreement in mediation, AgriBank foreclosed on August 30, 1994. The redemption period expired one year later, on August 30, 1995. After the redemption period had passed, appellants brought an action in state court against respondents Agribank, Farm Credit, Resch, Bloch, and agencies offering Bloch's services. Appellants claimed, first, that the mediator was negligent for his alleged failure to reduce an oral agreement on April 20, 1994, to writing. The trial court dismissed this claim on the principle of mediator immunity. Next, appellants claimed that the foreclosure sale was voidable, alleging that AgriBank violated its duties by not accepting appellants' initial debt reduction plan and failing to mediate effectively. The trial court granted summary judgment on this claim for failure to state a valid cause of action. Finally, appellants sued for breach of contract on the alleged agreement made on April 20, 1994. The trial

court granted summary judgment on this final claim for the lack of a genuine issue of material fact.

DECISION

2 Upon review of decisions to dismiss for failure to state a claim for which relief can be granted, the only question before the appellate court is whether the complaint sets forth a legally sufficient claim for relief. *Elzie v. Commissioner of Pub. Safety,* 298 N.W.2d 29, 32 (Minn.1980). On a dismissal by summary judgment, a reviewing court must determine whether there are any genuine issues of material fact or whether the lower court erred in its application of the law. *State by Cooper v. French,* 460 N.W.2d 2, 4 (Minn.1990). Appellants raise three major issues on appeal.

1. Mediator Immunity

The first issue appellants raise is whether the mediator and his sponsoring agencies are immune from liability. The duties of a mediator under the Farmer-Lender Mediation Act are defined by Minn.Stat. § 583.26, subd. 6 (1996). Interpreting the scope of a statute is a matter of law, which this court may review without deference to the trial court's decision. *See Hibbing Educ. Ass'n v. Public Employment Relations Bd.,* 369 N.W.2d 527, 529 (Minn.1985) (holding that the construction of a statute is a question of law fully reviewable by an appellate court).

The trial court found the mediator, the University of Minnesota, the Farm Credit Mediation Program, and the Minnesota Extension Service all immune from liability. The court based its conclusion on the statutory provision that a mediator is immune from civil liability for actions within the

scope of the position as mediator. Minn.Stat. § 583.26, subd. 7 (1996). Appellants argue that the statute is inapplicable because the mediator erred while performing ministerial duties not related to the scope of his position as mediator. Specifically, appellants allege that the mediator should have noted the "agreement" that had been reached between themselves and Resch; namely, they agreed that Resch would have accepted cash or a letter of commitment for the balance of the mortgage. Consistent with the views of respondents, even if the recording of an actual agreement were considered a ministerial task, the mediator used his independent judgment within the scope of his duties as a mediator to determine that no agreement could be reached between the parties. As such, Bloch's determination was a discretionary matter subject to the provisions of section 583.26.

Appellants compare the position of a mediator to that of an arbitrator and cite *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 376 (Minn.1989), for the proposition that the doctrine of arbitral immunity does not protect every action of an arbitrator. In *Rapistan,* the Minnesota Supreme Court, noting its policies of encouraging arbitration and protecting the independence of the process, upheld an arbitrator's immunity for failure to disclose prior business of social contacts. *Id.* at 337. But the court emphasized that arbitrators would not be immune from criminal liability or claims of fraud; although plaintiffs could not seek civil liability of the arbitrator for these actions, the court concluded that plaintiffs in such a situation could sue to set aside an arbitrator's award. *Id.* In the immediate case, appellants do not allege criminal liability or fraud on the part of the mediator such that the validity of his decision should be called into question.

3. Because the mediator and his sponsoring agencies are

immune under Minn.Stat. § 583.26, subd. 7 (1996), we need not also address the disputed proposition that mediators are also protected by a quasi-judicial common law immunity. *See Gammel v. Ernst & Ernst,* 245 Minn. 249, 254, 72 N.W.2d 364, 368 (1955) (extending quasi-judicial immunity to arbitrators); *Stewart v. Case,* 53 Minn. 62, 67, 54 N.W.2d 938, 938 (1893) (extending quasi-judicial immunity to assessors); *see also Tindell v. Rogosheske,* 428 N.W.2d 386, 387 (Minn.1988) (extending quasi-judicial immunity to guardians ad litem).

2. Cause of Action to Void the Foreclosure

Appellants also claim that they have a cause of action for respondents' failure to accept a proposed restructuring proposal and point to *Federal Land Bank v. Overboe,* 404 N.W.2d 445, 449 (N.D.1987) and *Burgmeier v. Farm Credit Bank,* 499 N.W.2d 43, 51 (Minn.App.1993), *review denied* (Minn. July 15, 1993), for the proposition that this court may void the foreclosure sale. In *Overboe,* the North Dakota Supreme Court expressly recognized that although no implied right of action exists for violations of the Farm Credit Act or its regulations, the Act "may nevertheless afford a basis for an equitable defense to a foreclosure action." 404 N.W.2d at 448. The regulation at issue in *Overboe* directed the lenders to develop loan servicing policies that provide a means of forbearance for a cooperative borrower who is making an honest effort to meet the loan contract and is capable of handling the debt burden. *Id.* at 447 (quoting 12 C.F.R. § 614.4510(d)(1)). Appellants in the present case allege that they may bring a cause of action for respondents' failure to mediate in good faith. But the court in *Overboe* concluded that the regulation did not imply a private right of action and instead gave rise to a "valid equitable defense to a foreclosure action under state law," which is not the application of law proposed here. *Id.* at 449.

In *Burgmeier,* this court permitted a former landowner to bring suit to enjoin further foreclosure proceedings and void a foreclosure sale for the lender's failure to provide the landowner with a "meaningful opportunity to restructure his debt." *Burgmeier,* 499 N.W.2d at 46. Although the redemption period in *Burgmeier* had expired by the time this court issued its opinion, appellants properly brought their cause of action in trial court during the redemption period. While *Burgmeier* may provide a borrower an equitable defense to a state foreclosure action and allow a landowner to enjoin foreclosure proceedings, it does not suggest that the claim can be advanced by a suit commenced after the period of redemption has expired. In the present case, appellants failed to state their cause of action within the permissible redemption period, thus forfeiting any claim that they may have had.

3. Breach of Contract

4. Appellants allege that they have a cause of action for breach of contract because respondents failed to accept 21st Century Bank's "letter of commitment." This issue turns on a matter of contract interpretation. The construction and effect of a contract are questions of law for the court. *Turner v. Alpha Phi Sorority House,* 276 N.W.2d 63, 66 (Minn.1979).

It is undisputed that Resch's offer called for cash or a commitment by a lender. The trial court found that 21st Century's letter was not a valid "letter of commitment" as intended by Resch, the offeror. The letter observed that because appraisal and cash flow information were received by the bank, "it is safe to assume" that a $221,000 state loan would be approved by the state. The court determined that such language was not sufficient as a "commitment" and contrasted sharply from a letter of commitment that the appellants received in 1982

that stated "[w]e will be able to make a $330,000 gross loan." Although 21st Century's letter indicated that appellants should not have a problem receiving a loan, the trial court correctly determined that this language is not a final commitment as a matter of law.

Affirmed.

APPENDIX C

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF COTTONWOOD FIFTH JUDICIAL DISTRICT
COURT FILE NO. [C1-95-262]

Leslie and Gail Schaffer,

Plaintiffs,

vs. ORDER

AGRIBANK, FCB, formerly known as THE FEDERAL LAND BANK OF ST. PAUL; FARM CREDIT SERVICES OF SOUTHERN MINNESOTA, ACA; THOMAS RESCH; JAMES E. BLOCH, individually and in his capacity as mediator; FARM CREDIT MEDIATION PROGRAM and MINNESOTA EXTENSION SERVICE, and the UNIVERSITY OF MINNESOTA,

Defendants.

The above-entitled matter came on before the Court on December 18.1 1995 upon the motion to dismiss and to award costs and fees brought by the University of Minnesota, the Farm Credit Mediation Program, the Minnesota Extension Service, and James E. Bloch. Tracy M. Smith of Minneapolis, Minnesota represented the moving defendants. Jeff C. Braegelmann of New Ulm, Minnesota represented defendants Agribank, FCB, Farm Credit Services of Southern Minnesota, ACA, and Thomas E. Resch. Lawrence H. Crosby of Saint Paul, Minnesota, represented plaintiffs.

Based upon all the files, arguments of counsel, records and proceedings herein,

IT IS HEREBY ORDERED that the motion to dismiss the claims against defendants the University of Minnesota, the Farm credit Mediation Program, the Minnesota Extension Service, and James E. Bloch is GRANTED; and it is further

ORDERED that the claims against those defendants be, and the same hereby are, DISMISSED WITH PREJUDICE and JUDGMENT IS ENTERED IN FAVOR OF DEFENDANTS THE UNIVERSITY OF MINNESOTA, THE FARM CREDIT MEDIATION PROGRAM, THE MINNESOTA EXTENSION SERVICE, AND JAMES E. BLOCH on all counts in the complaint and it is further

ORDERED that defendants' motion for reasonable costs and attorney's fees is DENIED.

The within memorandum is made a part of this order.

IT IS SO ORDERED.

LET JUDGMENT ENTER ACCORDINGLY

Dated: [February 27th, 1996]

s/s
Bruce F. Gross
Judge of District Court

MEMORANDUM
Leslie and Gall Schaffer v. Agribank, FCB, et al
Court File No. C 1 -95-262

I. Whether James E. Bloch, Individually and in His Capacity as Mediator and University of Minnesota Should be Dismissed from this Action.

A. Whether Mediator Immunity Bars the Plaintiff Claims Against the University of Minnesota and the Mediator Mr. Bloch.

Plaintiffs' allege that the University of Minnesota and Mr. Bloch, the mediator, failed to provide effective mediation thus making these entities liable to plaintiffs under both contract and negligence theories. This allegation is based on the claims that Mr. Bloch failed to fulfill statutory obligations owed plaintiffs, including not referencing the alleged agreement in the termination statement, failing to issue an affidavit of bad faith against creditors Agribank, FCB, and Farm Credit Services of Southern Minnesota (FCS), and that Mr. Bloch had a conflict of interest and a previous association with Federal Land Bank of St. Paul and should not have been approved as the mediator in this matter. Complaint p. 6, 9-1 0. Plaintiffs seek damages in excess of $50,000.

Defendant Bloch and the University of Minnesota assert mediator immunity shields them
from being sued in this instance. M.S.A- §583.26 states in its relevant part:

> **Subd. 7 Mediator liability and immunity.** (a) A mediator is immune from civil liability **for actions within the scope of the position as mediator.** A mediator does not have a duty to advise a creditor or debtor about the law to encourage or assist a debtor or

creditor in reserving or establishing legal rights. This subdivision is an addition to and not a limitation of immunity otherwise accorded to a mediator under law.

(emphasis added).

Therefore, the key inquiry is whether the alleged acts or inaction of the mediator was "action within the scope of the position as mediator." Id. If so then Minnesota and Mediator Bloch are immune from liability. Any immunity extended to the mediator himself should also extend to his employer. See Pletan v. Gaines, 494 N.W.2d 38, 42 (Minn. 1992) (police officers immunity extends to employers) and 41 A.L.R- 4th 1104.

Mr. Bloch's signing the termination statement which stated that an agreement had not been reached was "action within the scope of the position as mediator" for the purposes of M.S.A- § 583.26 Subd. 7. The alleged oral agreement was that plaintiffs would present a letter of commitment by May 9, 1994 to defendant/creditors. On May 9, 1994 plaintiffs presented an alleged letter of commitment from 2lst Century Bank. Defendant/creditors refused to accept the letter in-question claiming that it did not meet the requirements of a letter of commitment. On June 1, 1994 mediator Bloch signed a termination statement which stated that no agreement had been reached. Mediator Bloch was acting within the scope of his position in making such a statement. Based on the actions of the parties it was unclear that an agreement had been reached. Nor can it be claimed that the mediator should have referenced this oral agreement. This is tantamount to requiring the mediator to actually draft the agreement himself. Finally, assuming that mediator Bloch did claim an agreement existed, the defendant/creditors would be able to make an

argument, as compelling as the plaintiffs have, that the mediator violated his duty in that no agreement was reached. Therefore it is clear to this Court that Mr. Bloch was acting within the scope of his position when he decided that an agreement was not reached between the parties.

Mediator Bloch's refusal to issue an affidavit of lack of good faith was also an act within the scope of his position. "If **the mediator determines** that either party is not participating in good faith ... the mediator shall file an affidavit indicating the reasons for the finding with the director and with parties to the mediation." M.S.A. § 583.27 Subd. 2 (emphasis added). This language clearly indicates that the decision to issue such an affidavit lies firmly within the discretion of the mediator. Since this decision is clearly within the mediator's discretion it can not be the basis for liability.

Quasi judicial immunity bars an claims against moving defendants based on mediator Bloch's failure to disclose prior business contacts with the parties based on quasi judicial immunity.[1] L&H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 377 (Minn. 1989) (arbitrators are immune from civil liability for their actions, even when they fall to disclose prior business or social contacts with parties.). The logic underpinning Airco is at least as persuasive in the mediation context. Permitting civil suit for a lapse of disclosure would

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1 See M.S.A. Sect. 583.26, Subd. 7, which states in its relevant part, "This subdivision is an addition to and not a limitation of immunity otherwise accorded to a mediator under law."

chill the willingness of mediators (like arbitrators) to serve because of the difficulty in remembering all contacts, however remote, with parties to the mediation. Id.

B. Whether the Plaintiffs Stated A Cognizable Claim Against the Moving Defendants.

A complaint must be dismissed unless it sets forth a legally sufficient claim for relief Minn.R.Civ.P. 12.02(e). Assuming that plaintiffs' allegations are true, plaintiffs fall to state a claim upon which relief may be granted.

Damages and negligence are essential elements of any negligence claim. The damages alleged are the result of a breach of the alleged agreement. Assuming that there was an agreement, the mediator had no conflict of interest, and the agreement was properly referenced in the termination statement the damages still would have occurred. A mediator's "task is to assist the parties in their quest for a voluntary settlement." Vol 4 Am. Jur. 2nd, Alternative Dispute Resolution § 16. Therefore, "[a] mediator's influence is limited by the autonomy of the parties and their willingness to assent. Thus a mediator can go no further than the parties themselves are willing to go." Id. The mediator does not make any determination of rights or liabilities but merely facilitates discussion between the parties in an attempt to come to a voluntary settlement. In short, no action of the mediator caused the damages alleged by the plaintiffs.

Plaintiffs allegation that the mediator had a conflict of interest due to a previous association with the defendant/creditors does not establish a casual link between damages alleged and the violation of the alleged agreement.

Given the fact that a mediator is in a position to merely facilitate discussion between the parties it is implausible to suggest that the mediator should be liable to the plaintiffs due to the defendants decision to breach an alleged agreement. This is not to say that a mediator should ignore conflicts of interests, on the contrary the appearance of neutrality is a cornerstone of alternative dispute resolution. Mediators should closely scrutinize their business and social relationships to see if a conflict exists.

Nor does plaintiffs allegation that the mediator's failure to reference the alleged oral agreement between the parties in the termination statement establish a causal link between the damages alleged and the breach of the agreement. The alleged failure of the mediator to reference the alleged agreement did not cause the defendant/creditors to breach the agreement. At best the failure to reference the agreement denied the plaintiffs one more piece of evidence to use in demonstrating the existence of the agreement.

Finally, plaintiffs allege that the mediator was negligent in not issuing an affidavit of bad faith upon plaintiffs' request. Even if this action did result in damages to plaintiffs it is due to plaintiffs error in that they failed to follow the proper procedure. The debtor may petition the court to review a mediator's failure to issue an affidavit of good faith. M.S.A. § 583.27, Subd. 6 (a). If the court finds that the mediator committed an abuse of discretion in failing to file such an affidavit the court may stay the creditor's enforcement action and require additional mediation. M.S.A. § 583.27, Subd. 6 (b). If plaintiffs wanted the Court to review the failure to issue an affidavit of lack of good faith they should have petitioned the Court when the mediation ended or while the creditors were exercising their remedies, rather than

a year and a half after the mediation was ended. By not petitioning for review of the mediators failure to issue an affidavit of lack of good faith at the end of the mediation plaintiffs have effectively waived their night to petition on that matter.

The within memorandum is made a part of the order.

B.F.G.

APPENDIX D

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF COTTONWOOD FIFTH JUDICIAL DISTRICT
DIVISION
COURT FILE NO. [C1-95-262]

Leslie and Gail Schaffer,

Plaintiffs,

vs. ORDER

AGRIBANK, FCB, formerly known as THE FEDERAL LAND BANK OF ST. PAUL; FARM CREDIT SERVICES OF SOUTHERN MINNESOTA; ACA; THOMAS RESCH; JAMES E. BLOCH, individually and in his capacity as mediator; FARM CREDIT MEDIATION PROGRAM and MINNESOTA EXTENSION SERVICE, and the UNIVERSITY OF MINNESOTA,

Defendants.

The above-entitled matter came on before the Court on February 5, 1996 upon motion of the moving defendants for summary judgment. Jeff C. Braegelmann of New Ulm, Minnesota represented defendants Agribank, FCB, Farm Credit Services of Southern Minnesota, ACA, and Thomas E. Resch. Lawrence H. Crosby of Saint Paul, Minnesota, represented plaintiffs.

Based upon all the files, arguments of counsel, records and proceedings herein the Court makes the following:

CONCLUSIONS OF LAW

1. That there are no material questions of fact.

2. There is no private cause of action for an alleged failure to mediate in good faith under Minnesota's Farmer-Lender Mediation Act.

3. Defendants, Agribank, FCB, Farm Credit Services of Southern Minnesota, ACA, and Thomas E. Resch are entitled to judgment as a matter of law on the claim that they failed to mediate in good faith.

4. There is no private cause of action under the Agricultural Credit Act for the relief which the Schaffers seek in this action.

5. There is no genuine issue of material fact that Schaffers failed to accept and perform the oral offer on which they base this claim and consequently, defendants, Agribank, FCB, Farm Credit Services of Southern Minnesota, ACA, and Thomas E. Resch are entitled to judgment as a matter of law on that claim.

IT IS HEREBY ORDERED THAT:

1. Plaintiffs complaint against defendants, Agribank, FCB, Farm Credit Services of Southern Minnesota, ACA, and Thomas E. Resch be hereby dismissed on its merits and with prejudice.

The within memorandum is made a part of this order.

IT IS SO ORDERED.

LET JUDGMENT ENTER ACCORDINGLY

Dated: [February 27, 1996]

s/s
Bruce F. Gross
Judge of District Court

MEMORANDUM

Leslie and Gail Schaffer
vs.
Agribank et al
Cl-95-262

I. WHETHER THERE IS A PRIVATE CAUSE OF ACTION FOR FAILURE TO MEDIATE IN GOOD FAITH.

Absent M.S.A. Sect. 583.27 there is no duty to mediate. The statute in question does not explicitly create an independent cause of action for a failure to mediate in good faith. Therefore, such an action can only be sustained if the statute implies a cause of action for violation of its provisions. To determine whether a private cause of action can be implied from a statute the following three part test should be employed.

1. Whether the plaintiff belongs to the class for whose special benefit the statute was enacted;

2. Whether the legislature indicated its intent to create or deny a remedy; and

3. Whether implying a remedy would be consistent with the underlying purpose of the legislative scheme.

Counties of Blue Earth v. Minnesota Dept. Of Labor and Ind., 489 N.W.2d 265 (Minn. App. 1992) (adopting test from Cort v. Ash, 422 U.S. 66, 45 L.Ed.2d 26 (1975)). All three factors must be met in order for the court to find an implied cause of action. In applying the test to this case it is apparent that no private cause of action should be applied. Under part one of the test it is clear that the Schaffers belong to the class whose special benefit the statute was enacted. However this factor alone does not give the Schaffers a right to a private cause of action.

Part two of the test indicates that the legislature did not intend to create a private cause of action under M.S.A. Sect. 583.27. The legislature created a specific remedy to address a parties[’] failure to mediate in good faith. M.S.A. S 583.27 Subds. 2 through 6. By creating this specific remedy and by not providing explicitly providing for a private cause of action the legislature has made clear its intent to confine a parties remedies to those statutorily provided. A precisely drawn statute preempts more general remedies. Counties of Blue Earth v. Minnesota Dept. of Labor and Ind., 489 N.W.2d 265, 268 (Minn. App. 1992).

Under part three of the test, a private right of action would be inconsistent with the underlying purpose of the legislative scheme. The statute provides that a party may seek to have the mediator file an affidavit of lack of good faith if the requesting party feels that another party is not participating in good faith. M.S.A. Sect. 5.83.27 Subd. 2. If the mediator declines to issue the affidavit then the requesting party may petition the district court for review of the mediator's action. M.S.A. Sect. 583.27 Subd. 6. Upon review the court may reinstate mediation and the stay of creditors' enforcement actions or order court supervised mediation. Id. A private cause of action would be inconsistent with the legislatively provided remedy.

In considering all three parts of the Cort M. Ash test it is readily apparent that no private cause of action may be implied in this instance.

Plaintiffs apparently argues that they are presently asking for judicial review of the failure of the mediator to issue an affidavit of good faith. Although the statute does not explicitly state that this review must occur at the end of the mediation period this is clearly the intent. The fact that the petition must be reviewed by the court in ten days and if the court finds the mediator did abuse his discretion the court may stay the creditor's enforcement action suggests that this remedy should be sought near the end of the mediation period or immediately thereafter. M.S.A. Sect. 583.27 Subd. 6.

II. WHETHER PLAINTIFFS CAN RECOVER BASED ON DEFENDANTS' ALLEGED FAILURE TO AFFORD PLAINTIFFS RESTRUCTURING OPPORTUNITIES UNDER THE AGRICULTURAL CREDIT

ACT.

There is no federal cause of action under the Farm Credit Act and its amendments. Zajac v. Federal Land Bank, 909 F.2d 1181, 1183 (8th Cir. 1990). Nor is there a private cause of action under Minnesota law. Burgmeier v. Farm Credit Bank of St. Paul, 499 N.W.2d 43 (Minn. App. 1993); Ebenhoh v. Production Credit Assn, 426 N.W.2d 490, 492 (Minn. App. 1988); Production Credit Ass'n v. Van Iperen, 396 N.W.2d 35, 38 (Minn. App. 1986). However a bank's failure to comply with the substantive provisions of the Act relating to giving the debtor an opportunity for restructuring provides the borrower with an equitable defense to state foreclosure action. Burgrmeier, 499 N.W.2d 43 (Minn. App. 1993). It is clear that in this action plaintiffs are trying to use the bank's alleged failure to accept restructuring proposals as a private cause of action rather than an equitable defense. The fact that plaintiffs are claiming money damages based on this claim demonstrates that this is not an equitable defense. Furthermore, plaintiffs can not wait for the completion of the foreclosure sale, expiration of the redemption period and final acquisition of the property by the foreclosing creditor and then and only then raise this equitable defense. The time to raise this defense was during the foreclosure. See Burgmeier, 499 N.W.2d at 46 (Burgmeier brought suit to enjoin further foreclosure proceeding and to void the foreclosure sale, The trial court denied Burgmeier's motion to toll the redemption period during the pendency of that action thus allowing the redemption period to expire during appellate review).

> There is a vast difference between allowing use of a regulatory violation as a "shield," in the form of an equitable defense to foreclosure, and allowing its use as a "sword" to create a

> state-based tort action for recovery of damages where no direct private right of action for damages is recognized.

Production Credit Ass'n of Fargo v. Ista, 451 N.W.2d 118 (N.D. 1990). Part of that vast difference is that the borrower may not sit on his defense until after the action is completed and then attempt to undue the entire action by alleging his equitable defense.

Burgmeier also states,

> The provisions for restructuring distressed loans also indicate Congress intended that a borrower be afforded restructuring rights prior to foreclosure. Such procedure are particularly appropriate in this case where FCB sought to foreclose appellant's mortgage by advertisement. Unlike foreclosure by action before the district court, a borrower has no ability to raise an equitable defense in a foreclosure proceeding. The state court, therefore, is an appropriate forum to allow the borrower to assert a lender's violation for a substantive provision of the Farm Credit Act as an equitable defense to foreclosure proceedings.

499 N.W.2d at 50 (citations omitted). Implicit in this statement however is the notion that the borrower not sit on their hands and wait until the foreclosure action was completed and the redemption period had expired but rather that the borrower would take timely action in state court, and exercise there equitable defense, like the borrower in

Burgmeier.

III. WHETHER PLAINTIFFS HAVE A CAUSE OF ACTION FOR BREACH OF THE ALLEGED AGREEMENT REACHED IN MEDIATION.

There are no material fact questions concerning the terms of the alleged offer. The plaintiffs had to come up with $220,600.00 cash or a letter of commitment by May 9, 1994 which was the last mediation meeting. Plaintiffs stated that they understood that an adequate letter of commitment was one similar to the one presented to them when FCS agreed to loan plaintiffs funds on August 6, 1982. Plaintiffs claim that they presented a letter of commitment to defendants on May 9, 1994 but that it was refused. The May 9, 1994 letter from Robert P. Reiter, President of 21st Century Bank states in its relevant part,

> []21st Century Bank is interested in completing an application to submit to Rural Finance Authority. To do this one of the items we need is an appraisal. It is my understanding that Farm Credit Services recently completed an appraisal valuing the property in question at $500,000 or more. Based on that information and the cashflow that has been prepared it is safe to assume that the State of Minnesota would approve a loan of approximately $221,000.

This contrasts sharply with the August 6, 1982 letter of commitment from Grant W. Johnson of the Federal Land Bank Association of Windom, which states, "We will be able

to make a $330,000 gross loan as outlined in the Notice of Approval dated August 6, 1982. The 1982 letter is a firm commitment that the Federal Land Bank will loan $330,000. This is a definite and enforceable loan commitment. By contrast the 1994 letter merely states that 21st Century Bank will process the loan and- does not anticipate any problems in the loans approval. This is not a definite enforceable loan commitment.

The evidence is also clear that the letter of commitment must be received on May 9, 1994. See letter of Mrs. Schaffer to Mr. Resch dated June 20, 1995 and Mr. Peterson's letter to Mr. Resch dated June 3, 1994.

Therefore the terms of the agreement were clearly understood by all the parties. As stated above the evidence shows that there was no letter of commitment produced by plaintiffs on May 9, 1994.

This is a clear example of a unilateral contract. The only way plaintiffs could accept was by tendering the required performance pursuant to the terms of the offer. Cedarstrand v. Lutheran Brotherhood, 263 Minn. 520, 117 N.W. 2d 213 (Minn. 1962) Harting v. Billmeir, 243 Minn. 148, 66 N.W.2d 784 (Minn. 1954). The affect of plaintiffs failure to perform is that they have no cause of action for a breach of this offer. This agreement can not be enforced since the deadline has passed without adequate performance and acceptance. Nor did the agreement survive beyond the deadline of May 9, 1994. Finally, no tender of funds was ever made by plaintiffs under the alleged agreement.

The within memorandum is made a part of this order.

B.F.G.

APPENDIX E

STATE OF MINNESOTA DISTRICT COURT

COTTONWOOD COUNTY FIFTH JUDICIAL DISTRICT

Case Type 14: Other Civil

Court File No. C1-95-262

LESLIE SCHAFFER and GAIL SCHAFFER, husband and wife,

Plaintiffs,

v.

AGRIBANK, FCB, formerly known as THE FEDERAL LAND BANK OF ST. PAUL; FARM CREDIT SERVICES OF SOUTHERN MINNESOTA, ACA; THOMAS E. RESCH; JAMES E. BLOCH, individually and in his capacity as mediator; FARM CREDIT MEDIATION PROGRAM and MINNESOTA EXTENSION SERVICE, and the UNIVERSITY OF MINNESOTA,

Defendants.

AFFIDAVIT OF LESLIE SCHAFFER [and] GAIL SCHAFFER IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF MINNESOTA)
) SS
COTTONWOOD COUNTY)

Leslie Schaffer and Gail Schaffer, Plaintiffs and husband and wife, having been duly sworn, state:

1. We are the plaintiffs in this matter.

2. We personally requested the attached affidavits of Mr. Ray Satorious, Exhibit A, Mr. DeWayne Weber, Exhibit B, Mr. Ron Torkelson, Exhibit C, and the Affidavit from State Bank of Jeffers and James Dunse, Exhibit D.

3. Gail Schaffer and Leslie Schaffer came to the offices of Farm Credit Services in Windom, Minnesota, on or about February 20, 1994. We had completed the forms for restructuring which had been mailed to us by Farm Credit Services. The responsive papers were complete. Thomas Resch refused to accept these forms for restructuring or to even consider them. Les Schaffer handed these papers to Mr. Resch and Resch refused to take the papers. Mr. Resch said he did not have time to talk to us, and he walked away from us and left the building. Mr. Resch did not deal with us in good faith in any way. We left the office because we did not know what else to do.

4. Our indebtedness was about $220,000 in December, 1993. We received an appraisal from AgriBank, FCB, and Farm Credit Services, after our second-to-the last mediation session. This appraisal indicated that our land was worth $534,000, Exhibit E.

5. A more recent appraisal shows that our property was worth $510,100, Exhibit F.

6. The mediation sessions were not helpful because AgriBank did not appear to have any intention of allowing us

to mediate the debt.

7. We were sure that we had reached an agreement with AgriBank and FCS to pay approximately $220,000 and pay off our debt totally.

8. The mediator told us that the time for mediation went on until May 24, 1994. AgriBank and Farm Credit Services refused to continue to mediate past May 9, 1994.

9. We had a commitment from 21st Century Bank to loan us the money to pay for our indebtedness as of the last mediation session.

10. 21st Century Bank called Mr. Resch at Farm Credit Services to tell him that the funds were ready and available, but Resch refused to accept the funds.

11. Resch did not provide anything in writing to us to indicate why the commitment letter was insufficient or did not meet his criteria.

12. It would be unjust for defendants here to be allowed to claim defenses when they acted unfairly and underhandedly.

FURTHER YOUR AFFIANTS SAYETH NAUGHT.

Dated at Windom, Minnesota, this_____day of January, 1996.

/S/
Leslie Schaffer, Affiant

/S/
Gail Schaffer, Affiant

Signed and sworn before me, a Notary Public for the State of Minnesota, this_____day of January, 1996.

/S/
NOTARY PUBLIC

APPENDIX F

September 1, 1994

To Whom It May Concern:

I attended mediation meetings concerning Gail and Les Schaffer. As a seed salesman they asked me to please attend. Mar. 8, computer printouts were passed out to everyone in attendance. F.C.S. put a value of $441,048 on 520 acres they had a mortgage on: $207,290 principal, $6507 interest and $11,000 in stock. The total debt as of Jan. 1, 1994 was $202,797. F.C.S. felt they were underscored. Tom Resch of F.C.S. felt the Schaffers should deed back part of the land. The Schaffers wanted to look at restructuring and several other alternatives.

March 31, another set of computer printouts was furnished by F.C.S. showing a projection of F.C.S. mortgage of 25 years at 7 1/4 per cent with guarantee. Principal $3,203, interest $15,225 with total payments of $18,428 for 25 years. A notation stated verify/justify $32,000 in net income get loans reset and it should work. A discussion of releasing living expenses followed. No agreement was reached.

April 20, advocate stated he had several bankers interested in working with the Schaffers. Gail asked F.C.S. if the new appraisal they had ordered was available yet. Mr. Resch said no. The release of living expenses was labored over again. Cargill would only release funds if all creditors released equal amounts. F.C.S. offered to put $40,000 insurance coverage on buildings for 2 months. Storden Bank, Jeffers Bank and Cargill agreed to have the total of combined releases total $1600 for each April and May. The mediator did not furnish

anyone with a memorandum. Mr. Resch expressed his displeasure that too much time at the previous meetings had been devoted to the smaller creditors and he wanted to discuss F.C.S. He stated that during the 80's Hartland Bank and the Jeffers Bank did not bleed for F.C.S. Hartland's V.P. Torkelson said he was working at F.C.S. during the 80's. Asst. V.P. Dunse said he was working for the F.D.I.C. closing down banks during the 80's. There was a discussion about the county the Schaffer's farm is in being declared a disaster area in four out of the last six years. The U.S.D.A. had planned to issue disaster payments in 1993 but because of backlog hoped to get Schaffers payment to them in April or May. F.C.S. had decided not to issue Schaffers Federal Crop Insurance, which was one of the requirements to obtain funds. The mediator who is on the F.H.A. committee said F.H.A. was so far behind they had not gotten to the Schaffer's application yet that had been submitted Feb. 20, 1994. Mr. Resch said he saw trouble four years ago with the yields the Schaffers had. It was explained that 1991 and 1992 were bad drought years in the part of the county where the Schaffer's farm. 1993 rains and flooding were extreme throughout the county. Gail Schaffer asked Mr. Resch exactly how much money it would take to pay off F.C.S. Mr. Resch stated $220,600. Mr. Resch agreed to accept a letter of commitment at the next meeting May 9. F.C.S. would allow enough time for the funds to be provided. May 9, the appraisal ordered by F.C.S. was made available to look at. Value using cost approach $500,000. Value using income approach $494,200. Value using sales comparison approach $534,000. A letter of commitment was presented from 21 Century Bank from Bob Reiter President. Mr. Resch stated he did not feel it was the type of commitment he was looking for. Gail Schaffer related all of the requirements of the loan had been met and was assured by R.F.A. that the funds would be available in a few days. There

was a discussion about having another mediation meeting. Mr. Resch said he thought mediation was over. J. Block contracted the state office and said he was informed by his boss the Schaffer's mediation period would be in effect until May 24, 1994. Mr. Resch said he did not agree. In his opinion, mediation was over and the letter of commitment was not acceptable. Gail assured everyone the funds would be available to F.C.S. before the end of mediation. Mr. Resch would not agree to attend another meeting. Gail and her attorney Gary Peterson, requested the mediator to file an Affidavit of Bad Faith against F.C.S. The Schaffers also asked J. Block for a debtor's request for court supervised mediation form. J. Block said he did not have one with him but would look for one at home. Cargill and left the meeting.

I heard the agreement F.C.S. and the Schaffers made at the April 20 meeting and I believe the 21 Century Bank and the Schaffers met the requirements of the F.C.S. agreement. At no time did the mediator give me any summation in writing of discussions during meetings or of agreements reached between the debtors, and the creditors.

Sincerely,
s/s
Ray Sartorius

8th day of September
Cottonwood County, Minnesota

s/s
Notary Public
[notary stamp printed here]